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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES, Appellee

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2521-49

KENNETH NEIL STRADLEY, 1641 35th Street, N. W., Washington, D. C., Plaintiff,

v.

CAPITAL TRANSIT COMPANY, INC., a Corporation, 36th & M Streets, N. W., Washington, D. C., Defendant

COMPLAINT—FOR NEGLIGENCE—Filed June 9, 1949

(Damages for personal injuries to passenger on streetcar, collision between streetcar and automobile)

1. This Court has jurisdiction of this case because it involves a suit for personal injuries wherein the claim is in excess of $3,000.00.

2. That on or about August 4, 1947, at about 11:55 P. M., at or near 7th Street and Constitution Avenue, N. W., in the City of Washington, District of Columbia, a streetcar owned, maintained, controlled and operated by the defendant, Capital Transit Company, Inc., a corporation, acting by and through its agent, servant and employee, came into collision with a motor vehicle (jeep) operated by Manuel Bridgeman, of Ft. Myer, Virginia, said collision being caused by the negligent, careless and unlawful manner in which said defendant's streetcar was being controlled and operated by and through its agent, servant and employee, and in violation by said defendant, acting by and through its agent, servant and employee, of the Traffic Regulations,

then and there in full force and effect in said District. That [fol. 2] said streetcar provided by the defendant for the use of its passengers, including the plaintiff passenger, was in the sole control and dominion of said defendant.

3. That as a result of the aforesaid collision, and the defendant's aforesaid negligence, the plaintiff, a passenger in the streetcar owned, maintained, controlled and operated by the said defendant, acting by and through its agent, servant and employee, sustained severe and permanent injuries, and the plaintiff suffered and will continue to suffer great physical and mental pain and anguish and his nervous system was and will be, in the future, shocked and impaired, and permanently injured; and the plaintiff sustained severe and marked aggravation of certain preexisting disabilities and injuries, by reason thereof; that said injuries interfered, and will, in the future, interfere with plaintiff's preexisting abnormal gait and by reason thereof the plaintiff suffered and will continue to suffer great physical pain and difficulty in walking and moving about in the pursuit of his employment and personal affairs, and that plaintiff walks with great pain and difficulty, and the plaintiff was otherwise injured; that the plaintiff was unable to pursue his employment with consequent past and future loss of earnings; that plaintiff has incurred, and will in the future incur, large expense for medical and surgical treatment, hospitalization, medicines and X-rays, spinal operation to be performed involving the transplantation of a bone-graft which must be planted into plaintiff's lumbar spine, and for other purposes in his endeavor to be healed and cured of his injuries, that when said spine operation is performed, said plaintiff will be incapacitated for a long period of time with consequent heavy future loss of earnings and expense, and the plaintiff was otherwise damaged; all to the plaintiff's damage in the sum of Fifty-Thousand ($50,000.00) Dollars.

[fol. 3] Wherefore, the plaintiff demands judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars besides the costs of this action.

Lester Wood, 821 15th Street, N. W., Washington 5, D. C., Attorney for Plaintiff.

DEMAND FOR JURY TRIAL

The plaintiff demands a trial by jury in the above entitled cause under the provisions of Rule 38(b) of the Rules of Civil Procedure for the District Courts of the United States.

Lester Wood, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO BRING IN THIRD PARTY DEFENDANT—Filed June 27, 1949

Defendant, Capital Transit Company, before answering, moves ex parte for leave to make the United States of America a party to this action and that there be served upon it the summons and third-party complaint as set forth in Exhibit A attached hereto.

Hogan & Hartson, By George D. Horning, Jr., Frank F. Roberson, Attorneys for Defendant, 810 Colorado Building, Washington 5, D. C.

[fol. 4] EXHIBIT "A" TO MOTION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2521-49

KENNETH NEIL STRADLEY, 1641 35th Street, N. W., Washington, D. C., Plaintiff,

v.

CAPITAL TRANSIT COMPANY, a Corporation, 36th and M Streets, N. W., Washington, D. C., Defendant and Third-Party Plaintiff

v.

UNITED STATES OF AMERICA, c/o The Attorney General, Washington, D. C., Third-Party Defendant

THIRD-PARTY COMPLAINT

1. The plaintiff, Kenneth Neil Stradley, has filed against defendant, Capital Transit Company, a complaint, copy of which is attached hereto as Exhibit 1.

2. At the time and place of the collision referred to in plaintiff's complaint, the plaintiff was a passenger in the defendant, Capital Transit Company's streetcar which came into collision with an United States Army ¼ ton truck. Said truck was owned by the third-party defendant, United States of America, and was being operated by a soldier in the course of his employment, to wit, Manuel Bridgeman of Fort Myer, Virginia. The sole or contributing cause of said [fol. 5] collision was negligent operation of the third-party defendant's vehicle which was being driven carelessly and in violation of the motor vehicle and traffic regulations then in force and effect.

3. Any injuries which plaintiff suffered were due solely or in part to the negligence of the third-party defendant, United States of America.

Wherefore, defendant, Capital Transit Company, demands judgment against the third-party defendant for a contributable portion of any sum which may be adjudged against the Capital Transit Company in favor of the plaintiff, Kenneth Neil Stradley.

Hogan & Hartson, by George D. Horning, Jr., Frank F. Roberson, Attorneys for Defendant and Third-Party Plaintiff, Capital Transit Company, 810 Colorado Building, Washington 5, D. C.

* * * * * * * *

IN UNITED STATES DISTRICT COURT

ORDER—Filed June 27, 1949

This cause came on to be heard upon motion of the defendant for leave as third-party plaintiff to serve a summons and complaint upon the United States of America, and upon consideration thereof it is by the Court this 27th day of June, 1949,

Ordered, that the motion be and the same hereby is granted and the defendant is hereby given leave, as a third-party plaintiff, to serve a summons and complaint upon the United State of America.

Matthew F. McGuire, Judge.

* * * * * * * *

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER OF CAPITAL TRANSIT COMPANY TO COMPLAINT—Filed June 29, 1949

The defendant, Capital Transit Company, admits that on or about August 4, 1947, in the intersection of Seventh Street and Constitution Avenue, Northwest, Washington, District of Columbia, one of its streetcars, on which the plaintiff was a passenger, was struck by an United States Army ¼ ton truck. Said truck was owned by the third-party defendant, United States of America, and was being operated in the course of his employment by a soldier, to wit, Manuel Bridgeman of Fort Myer, Virginia. Defendant, Capital Transit Company, avers that the cause of said collision was negligent operation of the third-party defendant's vehicle, which was being driven carelessly, negligently and in violation of the motor vehicle and traffic regulations then and there in force and effect. The defendant is without knowledge or information sufficient to form a belief as to the injuries and damage allegedly suffered by the plaintiff. The defendant, Capital Transit Company, denies the remaining allegations of the complaint.

Hogan & Hartson, by George D. Horning, Jr., Frank F. Roberson, Attorneys for Defendant, 810 Colorado Building, Washington 5, D. C.

* * * * * * *

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THIRD-PARTY COMPLAINT—Filed August 18, 1949

Comes now the United States and by its attorney, the United States Attorney and moves this court to dismiss the [fol. 7] third-party complaint filed herein for the reason that it fails to state a cause of action upon which relief may be granted.

George Morris Fay, United States Attorney; Ross O'Donoghue, Assistant United States Attorney.

* * * * * * *

IN UNITED STATES DISTRICT COURT

OPINION.—Filed October 26, 1949

This case presents the question whether the United States may be made a third-party defendant for the purpose of contribution under the Federal Tort Claims Act, now incorporated in Title 28, United States Code.

Plaintiff instituted an action against the Capital Transit Co., Inc., alleging that he was a passenger on one of its street cars which collided with a "vehicle," and that the collision was caused by the negligence of defendant's employee. Defendant moved for leave to make the United States a party to the action. The motion was granted, and a third-party complaint was filed, alleging that the street car came into collision with a United States Army truck operated by a soldier in the course of his employment, and that the sole or contributing cause of the collision was the negligent operation of the truck, and demanding judgment for contribution. The United States has moved to dismiss the third-party complaint on the ground that it fails to state a cause of action upon which relief may be granted.

Section 1346 (b), Title 28 U. S. C., gives the District Courts "exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or em-
[fol. 8] ployment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Section 2674, Title 28 U. S. C., provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

Over fifty years ago, in Schillinger v. United States, 155 U. S. 163, 39 L. Ed. 108, 110, the Supreme Court had under consideration a case involving the jurisdiction of the Court of Claims, and in the first paragraph of its opinion, made the following pertinent observation: "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial

determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government." This view was reiterated in 1927 in Eastern Transportation Co. v. United States, 272 U. S. 675, 686, in the following language: "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires." Again in 1931, in United States v. Michel, 282 U. S. 656, in construing an Act permitting suits against the United States to recover Internal Revenue taxes, the Court held that it was "well established that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." Expressions of the Supreme Court to the same effect may be multiplied,[1] and they are controlling upon me. [fol. 9] Applying this rule of construction to the present case, I find nothing within the letter of the statute constituting a waiver of immunity in respect of claims against the United States for contribution in actions in tort. Such a claim is not one for "money damages for . . . personal injury or death," which is the language of the statute. It is a claim, equitable in character, for payment of a proportionate part of the claimant's liability for damages to a third person. As stated by Chief Justice Groner in George's Radio, Inc. v. Capital Transit Co., 75 U. S. App. D. C. 187, 189, the reason for that court's change of view allowing contribution "in the main hinges on the doctrine that general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligers without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." Or, as set forth by Judge Bryan, in Drummond v. United States (E. D., Va.) 78 Fed. Supp. 730, contribution, except in admiralty, "is not part of the original claim or tort," but is "an adjustment between defendants independent and separate from the plaintiff's claim, and rooting from principles of equity, not from the principles of tort-liability." Support for the view herein expressed is also found in those

[1] E. g. Klamath Indians v. United States, 296 U. S. 244, 250 (1935); United States v. Shaw, 309 U. S. 495, 502 (1940); United States v. Sherwood, 312 U. S. 584, 590 (1941).

cases holding that the United States may not be joined with another as a party defendant in an action under the statute here involved.[2] True it is, there is diversity of opinion among the Federal District Courts, on the question of joinder of the United States as a codefendant,[3] but none of those cases upholding such jurisdiction has expressly sanctioned the impleading of the United States as a third-party defendant solely for contribution. I am of opinion that it cannot be done under present statutory restrictions, [fol. 10] and accordingly the motion to dismiss will be granted.

Counsel will submit order in accordance herewith.

David A. Pine, Judge.

October 26, 1949.

* * * * * * *

In United States District Court

Order Granting Third-Party Defendant's Motion to Dismiss Third-Party Complaint—Filed November 2, 1949

The above cause having come on for hearing before the Court upon motion by the United States of America, Third-party defendant, to dismiss the Third-party complaint filed against it by the Third-party plaintiff, Capital Transit Company; the Court having considered the motion and the points and authorities filed in support thereof and in opposition thereto; the Court having considered the arguments of counsel; and the Court having filed a memorandum opinion in

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[2] Sappington v. Prencipe, U. S. District Court for D. C. (1948) C. A. 37213; Uarte v. United States, D. C. Cal. 1948, 7 FRD 705; Drummond v. United States, D. C. Va. 1948, 78 F. Supp. 730; Donovan v. McKenna, D. C. Mass. 1948, 80 F. Supp. 690.

[3] Englehardt v. United States, D. C. Md. 1947, 69 F. Supp. 451; Dickens v. Jackson, D. C., E. D., N. Y. 1947, 71 F. Supp. 753; Bullock v. United States, D. C. N. J. 1947, 72 F. Supp. 445.

respect of this motion on October 26, 1949; it is by the Court, this 2d day of November, 1949, hereby:

Ordered, Adjudged, and Decreed that the motion to dismiss the Third-party complaint be and the same hereby is granted.

David A. Pine, District Judge.

Submitted by Stafford R. Grady, Assistant United States Attorney, Attorney for Third-party Defendant.

No objection as to Form: Hogan & Hartson, by Frank F. Roberson, Attorney for Defendant and Third-party Plaintiff.

* * * * * * * *

[fol. 11] IN UNITED STATES DISTRICT COURT

MOTION FOR FINAL JUDGMENT ON THE THIRD-PARTY COMPLAINT—Filed November 2, 1949

Comes now the United States of America, Third-party defendant, and moves the Court under Rule 54(b) of the Federal Rules of Civil Procedure to enter a final judgment disposing of the Third-party complaint for contribution of the Capital Transit Company, Third-party plaintiff. The ground for this motion is that there is no just reason for delay in the entry of such a judgment.

Respectfully submitted, George Morris Fay, United States Attorney. Ross O'Donoghue, Assistant United States Attorney. Stafford R. Grady, Assistant United States Attorney, Attorneys for Third-party defendant.

Consent: Hogan & Hartson, by Frank F. Roberson, Attorney for defendant and third-party plaintiff.

* * * * * * * *

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT DISMISSING THIRD-PARTY COMPLAINT—Filed November 2, 1949

This action having come on for hearing before the Court upon motion by the United States of America, Third-party defendant, pursuant to Rule 54(b) of the Federal Rules of

Civil Procedure, for the entry of a final judgment disposing [fol. 12] of the Third-party complaint for contribution, counsel for Third-party plaintiff having indicated on the motion and having stated in open court that it consents to the entry of a final judgment at this time and the court being of the opinion that there is no just reason for delay, it is by the Court this 2d day of November, 1949, hereby:

Ordered, Adjudged, and Decreed that the motion for final judgment dismissing the Third-party complaint, is granted and the Clerk of the Court is hereby directed to enter the Third-party complaint filed by the Capital Transit Company against the United States of America, as dismissed with prejudice.

David A. Pine, District Judge.

Submitted by: Stafford R. Grady, Assistant United States Attorney, Attorney for Third-party Defendant.

No Objection As to Form: Hogan & Hartson, by Frank F. Roberson, Attorney for Defendant and Third-party Plaintiff.

* * * * * * *

In United States District Court

Notice of Appeal—Filed November 2, 1949

Notice is hereby given this 2nd day of November, 1949, that Capital Transit Company, defendant and third-party plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment of this Court entered on the 2nd day of November, 1949 in favor of the United States of America, [fols. 13-17] third-party defendant against said Capital Transit Company, third-party plaintiff.

Hogan & Hartson, by George D. Horning, Jr., Frank F. Roberson, Attorneys for defendant and Third-party plaintiff, Capital Transit Co., 810 Colorado Bldg.

[fol. 18] Wednesday, March 29, 1950.

* * * * * * *

No. 10467, January Term, 1950

CAPITAL TRANSIT COMPANY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before Honorable Bennett Champ Clark, George T. Washington, Circuit Judges, and Kimbrough Stone, Circuit Judge, sitting by designation.

On motion of Mr. Joseph M. Howard, Mr. Marvin Frankel of the Bar of the Court of Appeals of New York was permitted to argue for appellee pro hac vice by special leave of Court.

Argument in the above-entitled case was commenced by Mr. Frank F. Roberson for appellant, and concluded by Mr. Marvin Frankel, for appellee.

* * * * * * * *

[fol. 19] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed May 16, 1950. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES, Appellee

Appellant's Motion for Leave to File Copies of Subsequent Opinion

Comes now the appellant and moves the court for leave to file herein copies of the opinion of the United States Court of Appeals for the Third Circuit in the case of *Howey* v. *Yellow Cab Co.*, decided April 27, 1950. From the ex-

cerpts printed in 18 U.S.L. Week 2495-6 (issue of May 2, 1950), that case appears to be directly in point in support of appellant's contention in the present case that the Federal Tort Claim Act permits the United States to be brought in as a third-party defendant on a claim for contribution.

Respectfully submitted, George D. Horning, Jr., Frank F. Roberson, Attorneys for Appellant.

A copy of the foregoing motion was mailed this 16th day of May, 1950, to H. G. Morison Esq. attorney for appellee United States, Department of Justice, Washington, D. C.

Frank F. Roberson.

[fol. 20] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 1, 1950. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1950

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before: Clark, Washington and Kimbrough Stone *, Circuit Judges

Order

Upon consideration of appellant's motion for leave to file copies of the opinion of the United States Court of Appeals for the Third Circuit in cases Nos. 9966 and 9967, Howey et al. v. Yellow Cab Company v. United States of America, for the use of this Court in the above entitled case, and it appearing that copies of said opinion have been lodged with this Court, It is

Ordered that the motion be granted, and that the Clerk be, and he is hereby, directed to file said opinions forthwith.

Per Curiam.

Dated June 1, 1950.

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* Circuit Judge sitting by designation.

[fol. 21] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 1, 1950. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

v.

YELLOW CAB COMPANY

v.

UNITED STATES OF AMERICA, Third-Party Defendant-Appellant

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

v.

YELLOW CAB COMPANY

v.

UNITED STATES OF AMERICA, Third-Party Defendant Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 6, 1949

Before BIGGS, *Chief Judge*, and O'CONNELL and KALODNER, *Circuit Judges*.

OPINION OF THE COURT—Filed April 27, 1950

By BIGGS, *Chief Judge*.

There are two appeals at bar. They can be disposed of appropriately in one opinion. Two suits were brought in the court below because the Gutmanns and the Howeys, the original plaintiffs, riding together as passengers, were [fol. 22] injured in a collision which took place in Philadelphia on December 1, 1946 between a taxicab operated

by Yellow Cab Company, the original defendant and the third-party plaintiff, and a mail truck operated by an employee of the United States, the third-party defendant.

The Gutmanns and the Howeys sued Yellow Cab Company in the two suits referred to, jurisdiction being based on diversity and requisite amount. Thereafter, Yellow Cab filed a third-party complaint in each suit seeking to enforce contribution from the United States.[1] See Rule 14 (a), FRCP.

The United States, as third-party defendant, filed a motion to dismiss each suit on the ground that the Federal Tort Claims Act[2] "does not authorize the maintenance of suits upon derivative claims." These motions were denied and the United States then filed answers. The cases were consolidated for trial and evidence was presented by the plaintiffs, the original defendant and by the third-party defendant. The court below found Yellow Cab Company and the United States both guilty of negligence,[3] gave judgments against Yellow Cab in favor of the Gutmanns in the amount of $5,800, in favor of the Howeys in the sum of $2,000, and ordered one-half of the respective amounts to be paid by the United States by way of contribution. The United States then moved to set aside the verdicts on the same ground theretofore asserted, viz., that the FTCA did not authorize "derivative" suits against the United States. The District Court decided that the third-party actions could be maintained[4] and overruled the motions. The United States has appealed.

The United States in its briefs and argument in this court has treated the questions involved as if they were [fol. 23] those only of joinder, i. e., as if the issue were:

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[1] In the third-party complaints Yellow Cab demands judgment against the United States "for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs . . .".

[2] 28 U. S. C. (1946 ed.) Sections 921-946. Most of the provisions of what was the FTCA are now sown throughout revised Title 28. See "Table 1", an addendum to revised Title 28, United States Code, "Judiciary and Judicial Procedure", 28 U. S. C. A., as appears.

[3] The opinion was not reported for publication.

[4] The opinion was not reported for publication.

Does the FTCA permit the United States to be joined with Yellow Cab Company as a party defendant? In the court below, however, at least by way of pleading, emphasis seems to have been laid by the United States on the question as to whether actions for contribution, such as those asserted here against the United States, can be maintained under the applicable Pennsylvania statute, 12 P. S. Pa. § 2081. We will discuss the cases in the first instance as if the primary issue were one of joinder and then endeavor to dispose of the questions presented by the pending actions treating them as, what they in reality are, suits for contribution.

The primary question on the joinder phase of the appeals can be phrased as follows: Did the FTCA authorize joinder of the United States with another party defendant or did the Act only authorize suits brought against the United States as the sole or single defendant? Carefully balancing the language of the statute some courts have held that the United States may be joined with another defendant or defendants. See for example Englehardt v. United States (D. C. Md.) 69 F. Supp. 451. Subrogation against the United States also has been permitted. See United States v. Aetna Surety Co., 338 U. S. 366, referred to hereinafter, and the pertinent cases cited therein. Other courts have taken the view that the FTCA authorized suits against the United States only when it was the sole defendant, basing their conclusions in large part on legislative history. See Drummond v. United States (D. C. Va.) 78 F. Supp. 730 and Uarte v. United States (D. C. Cal.) 7 F. R. D. 705.[5]

At the time of the occurrence of the accident the provisions of revised Title 28, United States Code, were not in effect, the effective date of revised title being September 1, 1948. See Section 38 of the Act of June 25, 1948, c. 646, [fol. 24] 62 Stat. 992. The complaint was filed in the Gutmann case (Civil Action No. 7715 in the court below) on September 9, 1947, and in the Howey case (Civil Action No. 7859 in the court below) on October 27, 1947. Judgments

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[5] On this general subject see the note and the collection of authorities therein, 1 A. L. R. 2d 222, 230, 239 *et seq.* See also 35 Georgetown Law Journal, 1; 56 Yale Law Review, 534 at 554 *et seq.* and 62 Harvard Law Review, 321 *et seq.*

were entered in both cases in the court below on January 4, 1949, the adjudications therefore being made after the effective date of revised Title 28. Section 39 of the Act of June 25, 1948, provides that "The sections or parts . . . of . . . [the] Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." It appears that the FTCA as amended, was repealed by the Act of June 25, 1948. See the schedule referred to in Section 39, 62 Stat. 1008. It would follow that if a loss of rights would occur if the provisions of revised Title 28 were to be applied, the provisions of the FTCA as they existed prior to the effective date of the revised title must be deemed to be governing. See note 6 cited to the text in Hoiness v. United States, 335 U. S. 297, 301. In United States v. Aetna Surety Co., 338 U. S. at p. 370, at note 5 cited to the text of Mr. Chief Justice Vinson's opinion, reference is made to what may be regarded properly as the key section of the FTCA, viz., Section 410(a), Section 931 of Title 28 U. S. C. (1946 ed.), and it is stated that "This section is now divided, and, with immaterial changes, appears in [revised Title] 28 U. S. C., Sections 1346(b) and 2674."

In the cited case the Supreme Court was considering the effect of R. S. 3477, the "anti-assignment" statute, 31 U. S. C. A. Section 203, and held that an insurance company could bring an action under the FTCA in its own name against the United States upon a claim to which it had become subrogated by payment to an insured who would have been able to bring such an action. The issue with which we are concerned in the instant case was not precisely in focus in the Aetna Surety Co. decision. We state this because it seems to us possible that the language of Section [fol. 25] 1346(b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portion of Section 410(a) of the FTCA, 28 U. S. C. (1946 ed.) Section 931(a). We need not determine this question, however, for it is clear that the rights of the parties accrued before September 1, 1948, and, if the language of Section 1346(b) of revised Title 28 be narrower in scope, the instant cases must be determined under the FTCA as it existed prior to the date last stated. On the other hand if the words of Section 1346(b) do not effect any limitation of the rights of the parties we need not consider them here

for it is clear that they work no enlargement. Moreover, the FTCA as it existed prior to September 1, 1948, must be deemed to give the true congressional intent in respect to the rights of parties under the FTCA prior to the effective date of revised Title 28. We therefore shall consider the law as it existed prior to revised Title 28 and thus decide the instant cases.

The proponents of the United States as the sole or single party point out that Section 410(a) [6] of the FTCA, now 28 U. S. C. Sections 1346(b), 2402, and 2674, conferred exclusive jurisdiction upon United States district courts "sitting without a jury" to hear and determine claims "on account of personal injury" caused by the negligent act of [fol. 26] an employee of the Government, and that this presupposes a trial with the United States as the sole defendant since the Seventh Amendment requires, unless waived,

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[6] Section 410(a) was as follows:

"Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."

a jury trial for any other defendant. The proponents of the theory that the United States may be joined as a defendant argue that because Section 410 (a) provided that the Government should be liable "under circumstances where the United States if a private person, would be liable to the claimant for such damage . . . in accordance with the law of the place where the act . . . occurred" and also that ". . . the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . .", Congress had made the rights and liabilities of the United States equivalent to those of a private litigant and such a waiver of immunity by the sovereign permits its joinder. In modern practice juries very frequently are waived in trials in United States district courts. Had a jury been insisted on by the private defendant in the instant case there was no valid reason why the trial judge and the jury respectively should not have determined the liability of the United States and that of the private defendant. Cf. Elkins v. Nobel, (D.C. N. Y.) 1 F.R.D. 357.

The United States asserts that since Section 410 (b) of the FTCA, now 28 U. S. C. Section 2676, provided that a judgment against the United States in a Section 410 (a) action should constitute a complete bar to any suit brought by the claimant against the employee of the Government whose negligence gave rise to the claim, the negligent government employee could not have been joined as a third-party defendant with the United States as a third-party defendant. Cf. Dickens v. Jackson (D.C. N.Y.) 71 F. Supp. 753. But this contention carries little weight respecting joinder or non-joinder of the United States though as a practical matter it has served to eliminate government employees as defendants in most suits.

In some of the cases deciding in favor of non-joinder much is made of the fact that Section 412 of the FTCA, now [fol. 27] 28 U. S. C. Sections 1291, 1504, 2110, provided an alternative appeal from a judgment of a United States district court either to the appropriate court of appeals or to the Court of Claims of the United States. Section 412 provided, if the appeal was to the Court of Claims, that the notice of appeal, required by Rule 73, FRCP, should have endorsed upon it the written consent of all the appellees to the appeal as taken. Putting aside questions as to the power of Congress to have provided for an appeal from an

Article III court to an Article IV court or to have conferred upon the Court of Claims of the United States in the terms of Section 412 ". . . the same powers and duties [respecting appeals] as those conferred on a . . . court of appeals", it can be cogently argued that since the United States can be the only defendant in a suit in the Court of Claims, it must have been the congressional intent that the United States should be the sole appellant or the sole appellee in a suit arising under the FTCA for otherwise the Court of Claims might have been compelled to deal with the rights and obligations of the United States as a defendant in conjunction with those of other defendants, a course theretofore prohibited to it. This argument has weight.[7] Cf. §§ 1504 and 2106 of revised Title 28, United States Code.

Section 420 provided a period of one year for bringing suit on account of personal injuries. Cf. 28 U. S. C. Section 2401(b), as amended. Many of the statutes of limitations of the States governing suits for personal injuries are of longer duration. In Pennsylvania the limitation upon suits for personal injuries is two years. See 12 P.S. Pa. § 34. It can be argued therefore that Congress did not intend to permit joinder because a private defendant might be kept in the suit while the United States was eliminated. Such a result would be somewhat anomalous but as was pointed out by Judge Yankwich in 9 F.R.D. at pp. 153-4, the FTCA was a statute of *creation*.

[fol. 28] Section 422, now 28 U. S. C. Section 2678, provided for the payment of attorney's fees by the United States in the cases of successful litigants and prescribed criminal penalties for any attorney whose compensation exceeded 20% of the sum recovered under the FTCA. It is said that joinder of the United States with a private defendant would have rendered such a provision inoperable. This position is untenable.

There are other considerations advanced by Yellow Cab or in the decided cases, which require discussion. Section

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[7] No serious question of constitutionality can arise in the setting of the cases at bar. Cf. National Ins. Co. v. Tidewater Co., 337 U. S. 582. The appeal to the Court of Claims is a permissive one and the cases were brought here and not to the Court of Claims.

411, now repealed in pertinent part,[8] provided expressly that the practice and procedure under the FTCA should be in accordance with the Federal Rules of Civil Procedure. This was a shotgun proviso, however, and though it is urged, as is the fact, that Rule 20 (a) authorizes joinder, we cannot find this very persuasive.

A cogent argument in favor of joinder, however, lies in the fact that while Section 421, now 28 U.S.C. Section 2680, set out twelve exemptions from the operation of the FTCA, not one of them prohibited joinder or made any reference to subrogation or contribution. Cf. Old Colony Ins. Co. v. United States (6 Cir.) 168 F. 2d 931.

Though the legislative history of the FTCA is inconclusive, it will be observed that the report of the Committee on the Judiciary of the House of Representatives dated November 26, 1945, H. Rept. 1287, 79th Cong., 1st Sess., accompanying H.R. 181, entitled "Tort Claims Against the United States", stated respecting Section 301 of that bill, substantially the equivalent in language of Section 410 of the FTCA, that "It is intended that the district courts in exercising jurisdiction . . . shall exercise essentially the [fol. 29] same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act . . . The bill therefore does not permit any person to be joined as a defendant with the United States . . ." It should be noted that S. Rept. 1400, the report of the Special Committee on the Reorganization of Congress, accompanying S. 2177, 79th Cong. 2d Sess. which became Public Law No. 601, the Legislative Organization Act, Title IV of which is the FTCA, contained no such statement. It may be argued with some plausibility, therefore, that the earlier intention of the members of the Judiciary Committee of the House of Representatives to eliminate joinder of the United States was not insisted upon. In referring to the Federal Tort Claims title of S. 2177, S. Rept. 1400 stated that this title was almost identical with

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[8] See Schedule of Laws Repealed, following Section 39 of the Act of June 25, 1948, revised Title 28, United States Code, "Judiciary and Judicial Procedure," 28 U. S. C. A. as appears. See also S. Rept. 1559, 80th Cong., 2d Sess., accompanying H. R. 3214, in which the view was taken that the provision contained in Section 411 relating to the Federal Rules of Civil Procedure was unnecessary.

that which was incorporated in H.R. 181, with the exception that the $10,000 limitation had been removed. The report said respecting Section 410 of the FTCA, which was the same as Section 301 of H.R. 181: "The trial will be without a jury as is now the case in suits under the Tucker Act. The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, except that no punitive damages and no interest prior to judgment may be recovered." From the foregoing it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder and that the feature of the Tucker Act foremost in the mind of Congress was trial to the court without a jury.[9]

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[9] The argument of the United States respecting legislative history may be summed up as follows:

The Federal Tort Claims Act was included in Title IV Public Law No. 601, enacted by the 2nd Session of the 79th Congress. H.R. 7236, introduced in the 76th Congress 1st Sess., S. 2221 (passed by the Senate) and H.R. 6463 introduced in the 77th Congress 2nd Sess., S. 1114 in the 78th Congress 1st Sess., and H.R. 181 in the 79th Congress are to some degree progenitors of the present Act. Section 403 of H.R. 6463 read as follows: "If the damage, loss, injury, or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." Section 403 of S. 1114 contained substantially the same language. The United States points out that when the FTCA was enacted the language expressly providing for joinder and contribution was omitted. This, it is contended, demonstrates that Congress did not intend that joinder should be made or contribution should be effected.

We do not find this argument persuasive though, of course, it carries some weight. We adhere to the view that if Congress had intended to prohibit joinder it would have

[fol. 30] Emphasis may also properly be laid on the practice in admiralty under Section 3 of the Suits in Admiralty Act, 46 U.S.C.A. Section 743, where the language employed is very similar to that contained in Section 410 (a) of the FTCA.[10] There is no doubt that the United States can be impleaded by the respondent under Admiralty Rule 56. See Brady v. Roosevelt S.S. Co., 317 U. S. 575, and Hust v. Moore-McCormack Lines, 328 U. S. 707.

Upon consideration of all of these factors we conclude that the FTCA must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants. Though there is room for doubt our conclusion expresses our best judgment in respect to the issue involved. But can contribution be exacted from the United States under the FTCA in the cases at bar? This is a closely allied question.

Contribution is a right arising under the substantive law of the States. The pertinent Pennsylvania statute, as we have said, is the Act of June 24, 1939, P.L. 1075, 12 P.S. Pa. § 2081, which provides that "Contribution shall be enforceable among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary." See Fisher v. [fol. 31] Diehl, 156 Pa. Super. 476, 482, 40 A. 2d 912, 916, and Kravas v. Great Atlantic & Pacific Tea Co. (D.C. Pa.) 28 F. Supp. 66. The United States has been found equally guilty with Yellow Cab by the court below. It would follow that if the United States were a private party it would be primarily liable as a joint tort-feasor and contribution could

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done so by express mandate in the statute or by unmistakable legislative history in the reports accompanying the legislation as it was enacted. See the rules for the construction of legislative history as laid down by the Supreme Court of the United States by Mr. Justice Pitney in Duplex Co. v. Deering, 254 U. S. 443, 474-477.

[10] Section 743 in pertinent part read as follows:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . ."

be enforced against it by Yellow Cab under the Pennsylvania statute cited. But could contribution from the sovereign to Yellow Cab fall within the purview of the FTCA? Did the waiver of immunity by the sovereign go so far? We think that it did.

The provisions of Section 410 (a)[11] seem conclusive in this connection for that section conferred exclusive jurisdiction upon the United States district courts to render judgment on any claim against the United States "on account of personal injury . . .". Note that the jurisdiction of the United States district courts was not limited to the adjudication of *claims for damages.* The word "claimant" used in the statute was employed to designate any person who might assert the claim and was *not* limited to one who had sustained damage to his property or injury to his person. In other words a "claimant" in the eye of the statute was any one who had a claim against the United States *on account* of personal injury or damage to property. Broader phrases or words more likely to embrace liability generally are difficult to imagine. A joint tortfeasor would have a claim on account of personal injury as would a subrogee. This point was settled by the decision of the Supreme Court in United States v. Aetna Surety Co., *supra.* It would seem to have been the intention of Congress to put the United States on a precise parity with the [fol. 32] private litigant in suits cognizable under the FTCA. See Moore's Federal Practice, 2nd ed., Vol. 3, pp. 2730-2739.

The judgments in the instant cases are cast in proper form for it will be observed that at each number (Civil

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[11] Cf. the pertinent provisions of Section 1346(b) of revised Title 28, United States Code, as follows: ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cf. note 6, *supra.*

Action No. 7715 in the case of the Gutmanns, and Civil Action No. 7857 in the case of the Howeys) the judgments were first found against Yellow Cab and the court then ordered that judgments be entered in favor of Yellow Cab and against the United States for one-half of the amounts. The Pennsylvania law and practice do not require the existence of a joint judgment before a claim for contribution can be enforced against the joint tort-feasor.[12] The Pennsylvania third-party practice is within the purview of Rule 14(a), FRCP. Separate suits could have been filed against the United States by Yellow Cab, the United States being the sole defendant, and judgments of contribution could thus have been obtained by Yellow Cab. The principle of United States v. Sherwood, 312 U. S. 584, 587-8, arising under the Tucker Act, would be inapplicable even by way of analogy for such judgments would have been obtained in suits in which the United States was the sole defendant. In the instant cases the learned trial judge could have terminated the proceedings after judgments had been rendered in favor of the Gutmanns and the Howeys against Yellow Cab, and then could have proceeded to give separate trials to the United States on the issue of contribution. Surely the stricture of the Sherwood case, even if it were deemed to be applicable to cases involving joinder of the United States arising under the FTCA, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge. Cf. United States v. Aetna Surety Co., *supra.*

[fol. 33] It is urged that somehow and in some way there might be a difference in quality, and therefore in result, in a trial in which the liability of two joint tort-feasors is adjudicated as compared to a trial in which the right of one tort-feasor to exact contribution from another is determined even if the trials were to be proceeded with in the same court and before the same judge. This argument

[12] Note that in the case of Fisher v. Diehl, 156 Pa. Super. 476, 40 A. 2d 912, the wife could not sue the husband for negligent personal injuries. Therefore, a joint judgment could not have been obtained by her.

would seem to be based on the proposition that the liability of the United States would somehow be enlarged, or it would be placed in an invidious position because its blameworthiness is determined in a suit with that of another defendant. Such an argument seems divorced from reality. But in any event the short answer to it is that the doctrine of the Sherwood case is inapplicable by way of analogy to the instant cases for it was apparently the intention of Congress to cause the United States to stand in equality with the private litigant in suits arising under the FTCA.

The judgments of the court below will be affirmed.

Judge O'Connell heard the argument and participated in the consideration of these appeals but died before the opinion was filed.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 33] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10467

CAPITAL TRANSIT COMPANY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

Argued March 29, 1950. Decided June 5, 1950

Mr. Frank F. Roberson, with whom Mr. George D. Horning Jr., was on the brief, for appellant.

Mr. Marvin E. Frankel, Attorney, Department of Justice, of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Assistant Attorney General Morison, George Morris Fay, United States Attorney, Paul A. Sweeney, Attorney, Department of Justice, and Messrs. Joseph M. Howard and Joseph F. Goetten, Assistant United States Attorneys, were on the brief, for appellee.

Before Clark, Washington, and Kimbrough Stone,* Circuit Judges

OPINION

WASHINGTON, Circuit Judge:

This case presents the question whether under the Federal Tort Claims Act [1] the United States may be joined as a third party defendant in a suit between private litigants, when the purpose of such joinder is to secure contribution from the United States as a joint tort feasor.

The plaintiff, Kenneth Neil Stradley, filed suit for damages for personal injuries against the Capital Transit Com-

* Sitting by designation.

[1] Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, as amended. See 28 U. S. C. (1950 ed.) §§ 1346(b), 2671-2680 (codifying the major sections of the Act).

pany, appellant here, alleging negligence. Capital sought and obtained leave of court to make the United States a third party defendant, alleging that the negligence of a Government employee was the sole or the contributing cause of any injury which plaintiff sustained, and requesting that the United States be held liable for a contributable portion of any sum which might be adjudged against Capital in plaintiff's favor. Upon motion by the United States to dismiss the third party complaint for failure to state a cause of action upon which relief could be granted, the District Court entered a final judgment dismissing that complaint with prejudice.

[fol. 34] The Federal Tort Claims Act provides, in part, as follows:

> "Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." (Section 410(a), act of August 2, 1946, c. 753, Title IV, 60 Stat. 842)

The District Court in dismissing the third party complaint held that a suit for contribution was not one for "money damages for . . . personal injury or death," within the meaning of the Federal Tort Claims Act. Capital contends that this judgment was erroneous in that it too narrowly construed the waiver of sovereign immunity contained in the Federal Tort Claims Act; that the Act specifically provides that the United States shall be liable to the same extent and in the same manner as a private person; that the clear intendment was that local law should determine whether there is a right of contribution by the joint tort feasors; and that under the law of the District of Columbia, if the United States were a private person, it would be liable for contribution under the circumstances here presented. Appellant further argues that under the Act the United States has made itself amenable to the third party practice provided for in the Federal Rules of Civil Procedure and, accordingly, that the United States properly may be impleaded. The United States contends, first, that even if a suit for contribution is permissible under the Tort Claims Act, still the United States may not be joined as a third party defendant in a suit between private litigants; and, second, that in any event a suit for contribution is not within the scope of the Federal Tort Claims Act, not being a suit sounding in tort.

We have recently held, in *Sappington* v. *Barrett*, — U. S. App. D. C. — (decided April 14, 1950), that the United States cannot be joined as a co-defendant, to enforce liability as a joint tort feasor, in a suit between private litigants. In the instant case, we have the parallel question whether the United States can be joined as a third party defendant in such a suit. The United States Court of Appeals for the Third Circuit recently considered both ques- [fol. 35] tions—joinder of the United States as a joint tort feasor and its joinder as a third party defendant. It concluded that both types of joinder were permissible. *Howey* v. *Yellow Cab Co.* v. *United States; Gutmann* v. *Yellow Cab Co.* v. *United States*, — F. 2d — (decided April 27, 1950).[2]

We are constrained to disagree with the learned judges of the Third Circuit. The Act itself does not deal directly with the question of joinder. The legislative history, how-

[2] The actual question in both cases related to joinder of the United States as a third party defendant.

ever, deals with that question very clearly and positively. And the character and framework of the Act, as well as its legislative history, impel us to the conclusion that the United States has not consented to be joined either as a co-defendant or as a third party defendant in a suit between private litigants.

The Tort Claims Act was passed as one chapter of the Legislative Reorganization Act of 1946. Its purpose was twofold. First, it was to provide convenient administrative and judicial remedies to those injured through the fault of a Government employee. Previously, relief ordinarily could only be secured by obtaining passage of special bills by Congress. The second purpose of the Act was to relieve congressional committees of the overburdening work of considering these special bills, involving as it did the task of determining whether the United States should pay to private persons damages for injuries they had allegedly sustained because of the negligence of employees of the Government. Sen. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29-31. Thus, as a matter of function, in cases under the Tort Claims Act the District Courts are sitting in substitution for congressional committees, i. e., on a basis similar to the Court of Claims. *Drummond* v. *United States*, 78 F. Supp. 730-31. This is suggestive of the type of jurisdiction Congress intended to confer. And the report on House Bill 181, 79th Congress, 1st Session, makes explicit the congressional intent that no person should be permitted "to be joined as a defendant with the United States." House Bill 181 was substantially identical with the Tort Claims Act as finally passed.[3] The House Committee reporting on that bill said:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially

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[3] See Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 30; Brooks v. United States, 337 U. S. 49, 52. The Tort Claims Act has a long legislative history, having been submitted to Congress in many forms and for many years prior to its enactment. See Brooks v. United States, *supra*, at 51. The report accompanying the Tort Claims Act as finally enacted (Sen. Rep. 1400) was a report on the entire Legislative Reorganization Act, of which the Tort Claims Act was but one of seven titles. Accordingly, Sen. Rep. 1400 contained a relatively brief description of the Act. And, unlike H. R.

> the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (act of March 3, 1887, 24 Stat. 505; 28 U. S. C. sec. 41 (2)). *The bill therefore does not permit any person to be joined as a defendant with the United States* and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. See *United States* v. *Sherwood*, 312 U. S. [fol. 36] 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C. C. A. 5th, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891).) The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage." (H. R. Rep. 1287, 79th Cong., 1st Sess., p. 5) (Emphasis supplied)

Among the cited authorities in that report was *United States* v. *Sherwood*, 312 U. S. 584. There the question was whether or not a private party could be joined with the United States in a suit under the Tucker Act. The Court of Appeals had held in the affirmative, relying among other things on the joinder provisions of the Federal Rules of Civil Procedure. 112 F. 2d 587. The Supreme Court reversed, holding that the United States had not consented to be sued under the Tucker Act along with a private party,

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Rep. 1287, *infra*, which accompanied House Bill 181, Sen. Rep. 1400 makes no specific reference to the problem of joinder. The Court of Appeals for the Third Circuit observed that "the legislative history of the FTCA is inconclusive. . . ." It expressed the view, however, that the omission of any reference to joinder in Sen. Rep. 1400 indicated "that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder." Howey v. Yellow Cab Co., *supra*. But as we have noted, Sen. Rep. 1400 was not a detailed report; it merely outlined the major features of the Act. And, as has been pointed out, it was recognized in the report that with but one exception of substance, the Act is the same as House Bill 181, discussed in H. R. Rep. 1287, *infra*. We therefore consider it proper to give weight to H. R. Rep. 1287. See Uarte v. United States, 7 F. R. D. 705, 708-709.

and that therefore the District Court lacked jurisdiction of the suit against the United States. It further held that even if the Federal Rules were applicable they merely set out the manner in which jurisdiction was to be exercised and could not confer jurisdiction upon the Federal courts. While the *Sherwood* case is not, in the strict sense, controlling, we think its reasoning applicable here.[4] It is true that, unlike the Tort Claims Act, the Tucker Act specifically provided that the District Courts were to have jurisdiction concurrent with the Court of Claims, and that this influenced the Supreme Court's determination that joinder was not permissible. But Congress could not have provided in the Tort Claims Act that the District Courts shall have jurisdiction *concurrent* with the Court of Claims, as it did under the Tucker Act, for the reason that the Court of Claims does not exercise original jurisdiction in tort cases. And, as H. R. Rep. 1287 states, the type of jurisdiction to be exercised was referred to, in bills forming part of the history of the Tort Claims Act, as that of a court of claims. While that reference was deleted in the final draft as surplusage, we think the purpose and framework of the statute demonstrate that the District Courts, under the Act as under its predecessor bills, are sitting substantially as courts of claims.

The Act provides that upon the consent of all appellees an appeal may be taken to the Court of Claims from the [fol. 37] District Courts. 28 U. S. C. § 1504. The Supreme Court has said: "The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the

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[4] Sec. 411 of the Tort Claims Act provided that practice and procedure shall be in accordance with the Rules of Civil Procedure. When Title 28 was revised and codified, this section was omitted as surplusage, "since other provisions of the title provide that tort claims shall be asserted in civil actions, and that the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." Sen. Rep. No. 1559, 80th Cong., 2d Sess. (Amendment No. 61). This deletion makes clear that Congress, in the Tort Claims Act, did not intend, by reference to the Rules of Civil Procedure, to grant a greater measure of jurisdiction than had been indicated elsewhere in the Act, but merely to make the Rules applicable where jurisdiction existed.

Congressional power 'to pay the debts . . . of the United States'). . . ." *United States* v. *Sherwood, supra*, at 587. It seems unlikely that Congress intended the Court of Claims to determine judicial controversies between private litigants, something completely outside its normal function. Yet that result might follow from joinder of the United States with other defendants. "To magnify the anomaly, suppose the United States did not appeal, or was successful in the lower court while the other defendants were not, and thus put before the Court of Claims only private litigants." *Drummond* v. *United States*, 78 F. Supp. 730, 732. These factors are not conclusive. But they gain meaning when we note that as against the United States no jury trial may be had under the Act (28 U. S. C. § 2402 (1950 ed.)), while in suits between private litigants there is ordinarily a jury trial as a matter of right. Therefore, if joinder were permitted, the Court of Claims might have to review jury verdicts, clearly beyond the scope of its usual province, as well as non-jury determinations.

Apart from review by the Court of Claims, the question of jury trials presents a real problem if joinder is permissible. Particularly is this true of joinder of the United States as a third party defendant. In the present suit, for example, the United States would be permitted under the Rules of Civil Procedure (Rule 14a) to assert, in addition to its own defenses against a third party plaintiff, any defenses against the plaintiff's claim which the third party plaintiff may have. This opens up the possibility of the court and jury reaching opposite conclusions on the same questions. For the jury might find the defendant (third party plaintiff) liable to the plaintiff, finding against the third party plaintiff on all defenses asserted, while the court, at the same time, absolved the United States (third party defendant) of liability, finding, on the identical defenses, that the third party plaintiff was not liable to the plaintiff and, accordingly, that there was no right of contribution. Paradoxical possibilities of this sort are certainly indicative that Congress did not intend to permit such joinder.

Appellants contend that because the Act provides that the liability of the United States is to be the same in manner and extent as that of a private individual (28 U. S. C. § 2674) it must follow that the United States can be joined as third party defendant in litigation where a private

person would be amenable to such joinder. This contention has much force, *in vacuo*. But when the provision is read within the framework of a comprehensive scheme permitting suit against the Government, and with due consideration of legislative history, it becomes clear that the reference is only to "the jurisdiction of the claim and the liability for the claim," and not to "other incidents of litigation," such as the susceptibility of the United States to be joined in a suit between private parties. *Drummond* v. *United States, supra,* at 731. This is borne out by the fact that, in the very paragraph spelling out the liability of the United States, Congress provided that trial against the United States should be by the court without a jury, whereas, as we have noted, between private litigants jury trial is of right. Section 410 of the Act, now 28 U. S. C. [fol. 38] § 2402. The Act also provides a different rule as to venue than is the case in suits between private litigants. Compare 28 U. S. C. § 1402(b) with § 1391. And a special statute of limitations. 28 U. S. C. § 2401. The reference to liability merely means that the same substantive law should govern the question whether an employee of the United States had committed a tortious act for which the United States was responsible, and that the same measure of damages should be applicable, as if the United States were a private party. Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 32.

Thus, whether we approach the problem as one of merely interpreting the face of the statutory language, or whether we go behind that language to the history of the Act, we must reach the same conclusion, namely, that Congress did not intend the United States to be joined as a third party defendant. In our view, therefore, the Tort Claims Act does not permit the joinder of the United States either as a co-defendant (*Sappington* v. *Barrett, supra*), or as a third party defendant, in a suit between private litigants.

Joinder of parties is ordinarily no more than a question of procedure, and Rule 21 of the Federal Rules of Procedure provides that misjoinder of parties is not grounds for dismissal of an action. But in suits against the United States, such as the present, a different principle prevails. For the United States may only be sued in the manner and according to the procedure to which it has consented. The statute waiving sovereign immunity creates the bounds of the jurisdiction of the Federal courts in entertaining suit

against the United States. *United States* v. *Sherwood, supra.*

The Supreme Court has recently held that an insurance company can sue under the Tort Claims Act in its own name, on a claim to which it had become subrogated by reason of payments to the insured. *United States* v. *Aetna Casualty & Surety Co.*, — U. S. —, 18 U. S. L. WEEK 4060, 4064, decided December 12, 1949. In that case, Chief Justice Vinson, speaking for the court, said:

> "We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

The holding of the Supreme Court in the *Aetna* case represented a broad construction of the Act. But it was one which was amply supported by the purpose, structure and legislative history of the statute. In the present case, even applying the generous view laid down for us in the *Aetna* decision, we find that purpose, structure and history lead us to but one result—a result unfavorable to joinder.

Since we hold that the District Court had no jurisdiction to entertain the third party complaint, we need not here decide whether, in a separate action, appellant here may enforce whatever right to contribution it may have against the United States. Accordingly, without prejudice to the maintenance of such a suit, the judgment of the District Court dismissing the third party complaint is.

Affirmed.

[fol. 40] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 5, 1950. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1950

No. 10467

CAPITAL TRANSIT COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

Before Clark, Washington, and Kimbrough Stone, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Washington.

June 5, 1950.

[fol. 41] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jun. 8, 1950. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10467

CAPITAL TRANSIT COMPANY, a Corporation, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above entitled cause and include therein the following:

(1) Joint appendix to appellant's brief.

(2) Appendix to appellant's brief setting forth statutes and Rules involved.

(3) Minute entry of argument.

(4) Appellant's motion for leave to file copy of subsequent opinion and order thereon.

(5) Opinion of the United States Court of Appeals for the Third Circuit in cases Nos. 9966 and 9967, *Howey* v. *Yellow Cab Co.* v. *United States of America*, and *Gutmann* v. *Yellow Cab Co.* v. *United States of America*, decided April 27, 1950.

(6) Opinion of this Court decided June 5, 1950.

(6a) Judgment.

(7) This designation.

(8) Clerk's certificate.

George D. Horning, Jr., Frank F. Roberson, Attorneys for Appellant, 810 Colorado Building, Washington, D. C.

[fol. 42] CERTIFICATE OF SERVICE

A copy of the foregoing designation of record was mailed this 8th day of June, 1950, to H. G. Morison, Esq., Assistant Attorney General of the United States, Department of Justice, Washington, D. C.

George D. Horning, Jr., Frank F. Roberson, Attorney for Appellant.

[fol. 43] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 42, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and of the proceedings in the said Court of Appeals, as designated by counsel, in the case of: Capital Transit Company, Appellant, v. United States of America, Appellee, No. 10467, April Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fifth day of July, A. D. 1950.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.